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No. 85-1698

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

AUDREY E. GUTHRIE, Petitioner

v.

INTERNATIONAL DAIRY QUEEN, INC.,

ET AL., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals erred in holding that the District Court has not abused its discretion by dismissing the complaint without prejudice.

2. Whether the Second Circuit Court of Appeals correctly decided that leave to amend the complaint was inappropriate because the petitioner failed to request leave before the District Court.

3. Whether the Second Circuit Court of Appeals did not have jurisdiction to hear petitioner's appeal of the fine imposed by the District Court because petitioner failed to name the District Court as a party to the appeal.

PARTIES

1. Plaintiffs-appellants and Petitioner:

Paul M. Fennessy and Audrey E. Guthrie, individually and as executrix of the estate of Wallace D. Guthrie, deceased. Plaintiff Guthrie was the only appellant on the second appeal and is the sole petitioner here.

2. Defendants-appellees and Respondents:

A. Respondents Submitting this Brief:

This brief is submitted on behalf of the following defendants (appellees on the second appeal) and respondents: International Dairy Queen, Inc;,[1/] IDQ Distributors; Dairy Queen Supply; FSI; American Dairy Queen Corporation; Dairy Queen Financial, Inc.; Dairy Queen Realty, Inc.; Brazier Foods, Inc.; Golden Skillet

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[1/] See page vi for corporate affiliate list.

International, Inc.; "Dairy Queen" National Dealer Marketing Council; "Dairy Queen" Territory Operators Advisory Council; "Dairy Queen" Frozen Products (Canada) Limited; IDQ Distributors of Canada, Limited; "Dairy Queen" Canadian Dealer Marketing Council; Texas Dairy Queen Operators Council; Dairy Queen Japan Co., Ltd.; Dairy Queen Japan National Dealer Marketing Council and Queen's Jesters. These respondents are hereinafter collectively referred to as "Dairy Queen."

B. Other Defendants:

Only the underscored defendants were appellees on the second appeal: American Can Company; Bagcraft Corp. of America; Beatrice Food Company; Beck Vanilla Products Company, Butcher Boy Food Products, Inc., Campbell-Mithun Incorporated; Carter Paper

Company; Cash Plus, Inc.; The Coca-Cola Company; Commercial Testing Laboratory, Inc.; Crowley Foods, Inc.; The Continental Group, Inc.; Continental Can Company, Inc.; Delicious Foods Co.; SCM Corp.; Econovent Systems, Inc.; Dairy Queen of New Jersey, Inc.; Fisher Nut Company; George Fox Company; George & Thomas Cone Company; Granite State Packing Company; Green Bay Foods Company; H.C. Duke & Sons, Inc.; Henry & Henry, Inc.; Hickman, Coward & Wattles, Inc.; Hunt-Wesson Food, Inc.; Iceland Seafood Corporation; Interbake Foods, Inc.; J. Hungerford Smith Company, Inc.; Keebler Company; Kraft, Inc.; Lever Brothers; Lind Plastic Products, Inc.; Liqui-Box Corporation; Maryland Cup Corporation; Eagle Cone Corp.; Eastern Baking Company, Inc.; Sweetheart Plastics, Inc.; Nieco Product, Inc.; Owens-Illinois, Inc.; Pepsico, Inc.; Premier

Industries; Queens Farms Dairies, Inc.; Richardson Corporation; Shade Foods, Inc.; Schweigert Meat Company; Standard Foods, Inc.; Sysco Frosted Foods, Inc.; Stoelting Bros. Mfg. Co., Inc.; Stewart Sutherland, Inc.; Summit Travel Service; The Terson Company, Inc.; Ward-Johnston, Inc.; Union Carbide Corp.; United Brands Company; Upstate Milk Cooperative, Inc.; Victor Foods, Inc.; Valmac Industries, Inc.; Worcester Quality Foods, Inc.

C. Named defendants not served as of the date of dismissal or found insolvent or against whom the action was discontinued as of March 12, 1984:

Allied Meat Co.; Cummings Incorporated; Dart Corp.; Garden State Farms, Inc.; Food Service Products Company; G. D. Anderson Associates; Glazer, Crandall Company; Han-

Dee Pak, Inc.; Hank Ketchum; Interstate Distributors, Inc.; Food Producers (Int'l), Inc.; Plastics, Inc.; Presto Food Producers, Inc.; Suzanna's Kitchen, Inc. and the Travelers Indemnity Company and General Mills, Inc.

RELATED CORPORATIONS OF RESPONDENTS

Pursuant to Rule 28 and to help clarify the relationship of the respondents, Dairy Queen submits this list of affiliates, parents and subsidiaries of the Dairy Queen defendants:

1. Dairy Queen Realty, Inc., has been merged into Dairy Queen Financial, Inc.;

2. Dairy Queen Financial, Inc. changed its name to DQF, Inc., a wholly owned subsidiary of International Dairy Queen, Inc.;

3. Brazier Foods, Inc., is no longer a separate corporate entity and has not been in existance for over twenty years;

4. Golden Skillet International, Inc., is a wholly owned subsidiary of International Dairy Queen, Inc.;

5. Dairy Queen Frozen Products (Canada) Limited no longer exists;

6. Dairy Queen Japan Co., Ltd. is named Dairy Queen (Japan) Co., Ltd. which is 50% owned by International Dairy Queen and 50% owned by Maruberi;

7. IDQ Distributors of Canada Limited is named IDQ Canada, Inc. and it is wholly owned by Dairy Queen Canada, Inc., which is wholly owned by International Dairy Queen, Inc.;

8. FSI is not a corporation and thus has no parent corporation. It is a division of International Dairy Queen, Inc.;

9. "Dairy Queen" National Dealer Marketing Council is not a corporation and thus has no parent corporation;

10. "Dairy Queen" Territory Operators

Advisory Council is not a corporation and thus has no parent corporation;

11. "Dairy Queen" Canadian Dealer Marketing Council is not a corporation and thus has no parent corporation;

12. Texas Dairy Queen Operators Council is not a corporation and thus has no parent corporation;

13. Queens Jesters is not a corporation and thus has no parent corporation;

14. Dairy Queen Japan National Dealer Marketing Council is not a corporation and thus has no parent corporation;

15. IDQ Distributors is not a corporation and thus has no parent corporation. It is a division of International Dairy Queen, Inc.; and

16. Dairy Queen Supply is not a corporation and thus has no parent corporation.

It is a division of International Dairy Queen, Inc.

17. American Dairy Queen, Corporation is a wholly owned subsidiary of International Dairy Queen, Inc.

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STATUTES (RULES) INVOLVED

Rule 7 of the U.S. District Court for the Northern District of New York

(a) All pleadings and other papers shall be plainly and legibly written, typewritten, printed or reproduced, without erasures or interlineations, materially defacing them, in black ink on durable white paper of good quality, and, except subpoenas, notes of issue and exhibits, on the usual legal cap or letter size, and fastened in durable covers.

(b) All papers shall be endorsed with the name of the court, the title of the cause, the name or nature of the paper, in sufficient detail for identification, and the name and office address of the attorney.

(c) the record on final hearings, unless ordered printed, shall be plainly typewritten and bound in book form, paged and indexed.

(d) Papers not conforming to this rule shall not be filed without the allowance of a judge.

Rule 8 of the Federal Rules of Civil Procedure

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled

to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.
. . .

Rule 11 of the Federal Rules of Civil Procedure

. . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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STATEMENT OF THE CASE

This Brief is submitted on behalf of respondents International Dairy Queen, Inc.; American Dairy Queen Corporation; IDQ Distributors; Dairy Queen Supply; FSI; Dairy Queen Financial, Inc.; Dairy Queen Realty, Inc.; Brazier Foods, Inc.; Golden Skillet International, Inc.; "Dairy Queen" National Dealer Marketing Council; "Dairy Queen" Territory Operators Advisory Council; Dairy Queen Frozen Products (Canada), Limited; IDQ Distributors of Canada, Limited; "Dairy Queen" Canadian Dealer Marketing Council; Texas Dairy Queen Operators Council; Dairy Queen Japan Co., Ltd.; Queens Jesters; and Dairy Queen Japan National Dealer Marketing Council. All are collectively referred to herein as "Dairy Queen" or respondents.

Plaintiffs[2] commenced this antitrust action against a total of 92 defendants, including associations (councils) of "Dairy Queen" store operators in Japan and Texas, Mr. Hank Ketchum (a syndicated cartoonist and creator of "Dennis the Menace" cartoons), Pepsi-Cola and Coca-Cola, and at least one defendant who last sold products to Dairy Queen franchisees more than six years ago. The complaint is void of specifics as to which defendants are involved, how they allegedly aided a conspiracy, or what acts they performed. It is replete with allegations based upon "assumptions" and "suspicion," which petitioner admits she "cannot prove."

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[2] Plaintiff Paul Fennessy did not appeal Judge Munson's rulings. Accordingly, there is only one petitioner, Audrey Guthrie. Ms. Guthrie is hereinafter referred to as petitioner.

In fact, this action was started because American Dairy Queen Corporation had been awarded money against the plaintiffs by two New York arbitrators and plaintiffs did not wish to pay the amounts awarded. Other defendants were named, it appears, to enlarge the number of potential contributors to a settlement.

On March 12, 1984, the Honorable H. G. Munson of the Northern District of New York dismissed the complaint, without prejudice, pursuant to Rule 8 of the Federal Rules of Civil Procedure and Local District Rule 7, and on March 15, 1984, fined plaintiffs' attorney $1,000 for filing the complaint in bad faith in violation of Rule 11 of the Federal Rules of Civil Procedure. An appeal to the Second Circuit Court of Appeals from Judge Munson's ruling was dismissed on October 15, 1984, because of pending counterclaims, and the absence of a certificate

under Rule 54(b) of the Federal Rules of Civil Procedure. The counterclaims were thereafter voluntarily dismissed, and through an order dated June 19, 1985, Judge Munson formally dismissed the counterclaims and filed a certificate under Rule 54(b). Judge Munson also reaffirmed the March 12, 1984, dismissal of the complaint, the March 15, 1984, award of sanctions against plaintiffs' counsel, and the March 19, 1984, stay of execution of the sanction pending appeal. The petitioner appealed the June 19, 1985 affirmance of the March 12 and 15, 1984, orders of Judge Munson.

The Second Circuit Court of Appeals affirmed the June 19, 1985, order of the District Court. First, the Second Circuit held that the District Court did not abuse its discretion by dismissing the complaint without prejudice under Federal Rule of Civil Procedure 8 and Local District Court

Rule 7. Second, it held that the complaint was not simple, concise and direct, but confused, vague and prolix. Third, the Court stated that there was no arguable basis to believe that the petitioner could prevail against the vast majority of the defendants named in the complaint. Fourth, it held that the petitioner was precluded from complaining about the District Court not giving her leave to amend the complaint because she had failed to request such an opportunity before the District Court. Finally, the Court held that it lacked jurisdiction to review the imposition of sanctions by the District Court against the petitioner's attorney because the petitioner failed to join the District Court as a party to her appeal.

REASONS AGAINST GRANTING

THE WRIT OF CERTIORARI

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE SUBSANTIVE QUESTIONS PRESENTED IN THE PETITION.

Contrary to the petitioner's statement of the "questions presented", substantive antitrust law is not an issue in this petition. The complaint was dismissed without prejudice pursuant to Federal Rule of Civil Procedure 8 and Local Rule 7. Therefore, all of the following arguments of petitioner on the merits are irrelevant: the argument on pages 10-12 of the petition that an antitrust action should not be summarily dismissed (Question No. 1 presented by petitioner); the argument that the action should not have been dismissed before interrogatories (on the merits) were answered (Petitioner's Question 1 (c)); the argument on pages 14-17 that a trademark can be the linchpin in an antitrust arrangement; the

argument on pages 18-19 that an evidentiary hearing on the merits was necessary before dismissal (Petitioner's Question No. 1(a)); the argument on pages 28-43 that the complaint was legally sufficient and supported by the evidence (Petitioner's Question No. 2); and the argument on pages 43-44 that since the undisputed facts disclose violation of a statute, certiorari is proper. (This petition raises only procedural questions, and, thus, no substantive statute is involved.)

Similarly, petitioner states that there is a conflict between the Circuits raised by the "summary dismissal" of this action by the Second Circuit (see pages 13-14 of the petition). Yet, once again petitioner chooses to ignore that this action was not summarily dismissed -- it was dismissed without prejudice. Therefore, the Circuit Court's opinion is not in conflict with

other circuits which caution against summary dismissals in an antitrust action.

The argument of petitioner on pages 22-28 that the Second Circuit ignored Copperweld Corp. v. Independence Tube Corp., 467 U.S. 2731 (1984) is also irrelevant. That decision addressed whether a parent corporation could conspire with a subsidiary under Section One of the Sherman Act. Yet, the District Court and the Second Circuit did not decide whether a parent-subsidiary conspiracy would satisfy Section One of the Sherman Act. Nor did the District Court in any fashion suggest that it was dismissing the complaint because naming only the Dairy Queen defendants would leave a manageable number of defendants to the litigation. Indeed, the District Court invited the plaintiffs through a refiled lawsuit to name any defendant who should be named after a reasonable inquiry. The District Court did

not dismiss the complaint because of some misunderstanding of the pre-Copperweld state of the law. It dismissed it because of the failure to comply with Federal Rules 8 and 11 and Local Rule 7.

Thus, the substantive questions stated by the petitioner as the "questions presented" are not relevant to this petition. The only issues relevant to this petition are: whether the Second Circuit correctly held that the District Court did not abuse its discretion by dismissing the complaint without prejudice; whether the Second Circuit properly held that petitioner was precluded from complaining about the District Court not giving her leave when she never asked for it; and whether the Second Circuit did not have jurisdiction to hear petitioner's appeal of the fine imposed by the District Court because petitioner failed to join the District Court as a party to the appeal. It

must now be examined whether these issues warrant the granting of the writ of certiorari.

Rule 17 of the Rules of the Supreme Court lists some of the factors the Supreme Court considers when deciding whether to grant a writ of certiorari. These factors include:

1. A conflict among the Circuit Courts of Appeals;
2. A conflict between a Federal Court of Appeals and a State Supreme Court;[3]
3. A major departure from the law by the Court below;
4. A conflict between a state court and another state

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[3] This factor is clearly not applicable in this action. Petitioner does not contend that there is any conflict with a state court.

court or federal court on a federal question;[4]

5. An important federal question which has not been decided, but should be.

None of the issues in this case fall within any of these factors.

II. THE AFFIRMANCE OF THE DISMISSAL WITHOUT PREJUDICE UNDER RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL DISTRICT COURT RULE 7 RAISES NO ISSUE APPROPRIATE FOR CERTIORARI

The Second Circuit's holding that the District Court did not abuse its discretion by dismissing the complaint was clearly correct. A district court may, in its discretion, dismiss an action without prejudice under Federal Rule 8. Rule 8(a) of the Federal Rules of Civil Procedure provides

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[4] This factor is also clearly not applicable in this case since no state court decisions are involved in this case.

that a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Petitioner's complaint against some ninety-two defendants is not a short and plain statement of her claims. The Second Circuit held that the complaint was confused, vague and prolix. Further, it held that no arguable basis existed to believe the petitioner could prevail against the vast majority of the defendants, some of whom did not exist. The District Court did not dismiss the complaint merely because it was long, as claimed by petitioner in pages 20-21 of the petition; it dismissed the complaint because it was confusing, prolix, and named defendants without any basis. Therefore, it was clearly within the discretion of the District Court to dismiss the complaint without prejudice.

Courts often have dismissed confusing, repetitious and ambiguous complaints (under Rule 8) like that of petitioner's herein.[5] "Such a complaint, if allowed to stand, becomes a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions, and

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[5] See Hatch v. Reliance Insurance Co., 758 F.2d 409 (9th Cir. 1985), cert. denied, 106 S. Ct. 571 (1985) (complaint dismissed under Federal Rule of Civil Procedure 8 because it was long, confusing, and not a short and plain statement of a claim); Schmidt v. Herrmann, 614 F.2d 1221 (9th Cir. 1980) (confusing, distracting, ambiguous and unintelligible pleading struck under Rule 8); Carrigan v. California State Legislature, 263 F.2d 560 (9th Cir.), cert. denied, 359 U.S. 980 (1959); McCann v. Clark, 191 F.2d 476 (D.C. Cir. 1951), cert. denied, 342 U.S. 872 (1952); Renshaw v. Renshaw, 153 F.2d 310 (D.C. Cir. 1946); Corcoran v. Yorty, 347 F.2d 222 (9th Cir. 1965), cert. denied, 382 U.S. 966 (1965); Collier v. First Michigan Co-operative Housing Association, 274 F.2d 467 (6th Cir. 1960); Vance v. American Society of Composers, Authors and Publishers, 271 F.2d 204 (8th Cir. 1959), cert. denied, 361 U.S. 933 (1960).

pre-trial proceedings on collateral issues, most of which may have little relationship to the true issue in the case." Boruski v. Stewart, 381 F. Supp. 529, 533 (S.D.N.Y. 1974). (This quote also shows why the District Court properly dismissed the complaint before answers were submitted to interrogatories.)

Whether a lengthy, vague and confusing complaint may be dismissed under Rule 8 is within the sound discretion of the trial court. See, e.g., Renshaw v. Renshaw, 153 F.2d 310, 311 (D.C. Cir. 1946). In this case, the District Court clearly had the discretion to dismiss plaintiffs' rambling, redundant and ambiguous complaint.

Petitioner relies on a Second Circuit case, Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445 (2nd Cir. 1978), for the proposition that a court

should not dismiss a case without prejudice. (See petition, pages 12-13) However, that case merely held that a court should clearly state whether it is dismissing an action with or without prejudice; it in no way held that a dismissal without prejudice under Rule 8 is not within the District Court's discretion. Thus, Elfenbein is inapplicable to instant action because it is undisputed that the District Court clearly stated it was dismissing the complaint without prejudice.

This discretion of the District Court raises no issue appropriate for certiorari. First, there is no conflict with another circuit on this point. No other court has held that it is not within the discretion of a court to dismiss an action without prejudice under Federal Rule 8. Second, the Second Circuit merely followed a well-founded rule of law and, therefore, in no

way can it be argued that this decision was a major departure from the law. Finally, this issue does not raise a unique or new issue requiring a Supreme Court determination.

III. THE DENIAL OF LEAVE TO AMEND RAISES NO ISSUE APPROPRIATE FOR CERTIORARI

In this action, petitioner did not request that the District Court grant leave to amend the complaint. She therefore has no grounds to argue that the Second Circuit was incorrect in sustaining the District Court in light of this failure to request leave to amend before the District Court. See, e.g., National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO v. Carey, 557 F.2d 278, 282 (2nd Cir. 1977); Ginsburg v. Stern, 242 F.2d 379, 380-81 (3rd Cir. 1957). Furthermore, the District Court could not grant her leave to amend the complaint after it had been dismissed. See id;

Kelly v. Delaware River Joint Commission, 187 F.2d 93, 94-95 (3rd Cir. 1951), cert. denied, 342 U.S. 812 (1951); United States v. Newburg Mfg. Co., 123 F.2d 453, 454 (1st Cir. 1941) (an amendment under Rule 15 may not be made after dismissal).

Petitioner does not dispute this point. She relies on a case where leave to amend was requested of the District Court before dismissal. See Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594 (5th Cir. 1981) (page 21 of petition). In any event, the decision of whether or not to grant leave to amend is within discretion of the District Court. Thus, no issue is raised which conflicts with another circuit, is sufficiently important for Supreme Court review or which is unique or new and needs a Supreme Court determination. The law is well settled and undisputed.

IV. PETITIONER FAILS TO CITE REASONS WHY THE FINE ASSESSED AGAINST HER ATTORNEY VIOLATES THE DUE PROCESS CLAUSE OR RAISES AN ISSUE APPROPRIATE FOR SUPREME COURT REVIEW

Petitioner states in Question 3 of the "Questions Presented" in her petition that an issue is raised as to whether the $1,000.00 assessed against her attorney violates the due process clause. Petitioner's "question" totally misstates the decision below. The Second Circuit did not reach the issue of whether the due process clause was violated by the fine. It merely held that because the petitioner failed to name the District Court as a party to the appeal, it had no jurisdiction to hear the issue. The Second Circuit stated that the District Court was the proper appellee because the fines were directed to be paid to the clerk of the court, not the defendants. Petitioner does not argue that this

decision of the Second Circuit was incorrect. In fact, petitioner completely fails to explain anywhere in the petition how the due process clause was violated. In any event, the fine was wholly appropriate under Federal Rule of Civil Procedure 11 and the due process clause.

Plaintiffs' attorney, Thomas A. King, signed the complaint without any basis for believing that he could prevail against most of the non-Dairy Queen defendants, and without undertaking the reasonable investigation required by Rule 11. The action apparently was commenced against the Dairy Queen defendants simply to forestall the collection of the arbitrators' judgments and to bludgeon the defendants into settling a case which, if it is not dismissed in the early stages, will require them to make large expenditures for attorneys' fees. As a sanction for his violation of Rule 11, the District Court

properly ordered that plaintiffs' attorney pay a fine of $1,000.[6]

Many courts have utilized Rule 11 to punish attorneys or their clients for the commencement or continuation of lawsuits without proper investigation or for improper purposes. See, e.g., Tedeschi v. Barney, 757 F.2d 465 (2nd Cir. 1985), cert. denied, Chapman v. Smith Barney, Harris & Upham Co., 106 S. Ct. 147 (1985); Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983); Heart Disease Research Foundation v. General Motors Corp., 15 F.R. Serv. 2d 1517 (S.D.N.Y.), aff'd, 463 F.2d 98 (2d Cir. 1972); Rhinehart v. Stauffer, 638 F.2d 1169 (9th Cir. 1979);

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[6] Although imposition of punishment under Rule 11 is mandatory ("The Court shall . . ."), the form of sanction is within the sound discretion of the trial court. See Notes of Advisory Committee on Federal Rules of Civil Procedure, Rule 11, 1983 Amendment.

Hedison Manufacturing Co. v. NLRB, 643 F.2d 32, 35 (1st Cir. 1981); Anderson v. Allstate Insurance Co., 630 F.2d 677, 684 (9th Cir. 1980); Bertucelli v. Carreras, 467 F.2d 214 (9th Cir. 1972); Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1329-30 (9th Cir. 1981).

The claim that the due process clause is violated by the fine is also unfounded. The due process clause could be violated only if plaintiffs and their attorney had been denied "notice and an opportunity for a hearing" prior to the Court's Order.[7] Mullane v. Central Hanover Bank & Trust Co.,

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[7] Plaintiffs were not sanctioned without notice, nor without an opportunity to explain how the defendants were selected for this lawsuit. Moreover, the awarding of sanctions against plaintiffs' attorney was not a complete suprise to all present. It was fully expected by the Dairy Queen defendants, who had asked for the sanction of an award of attorneys' fees in their written motion.

339 U.S. 306, 313 (1950); Tribe, Constitutional Law § 16-15, at 550-5 (1978) ("At the core of the procedural due process right is the guarantee of an opportunity to be heard and its corollary, a promise of prior notice.") Here, plaintiffs were given notice and an opportunity to be heard. Several defendants properly noticed before the District Court their Motions to Dismiss under Rules 8, 9, and 12 of the Federal Rules of Civil Procedure, and for sanctions under Rule 11 including their attorneys' fees in connection with those motions. When the motions were heard, plaintiffs' counsel was given a full opportunity to file a Responsive Brief and to orally argue his position.

Thus, once again no issue is raised which raises a conflict with another federal circuit, which is important enough for Supreme Court review, or which is unique or

new and requires a Supreme Court determination.

V. THE SECOND CIRCUIT DECISION HAS NO PRECEDENTIAL VALUE

In any event, Supreme Court review is unnecessary in this action because the Second Circuit clearly stated that its opinion was not to be published or used for any purpose other than this action. Thus, the effect of the Second Circuit's affirmance is limited only to the parties in this action. Therefore, this case does not raise an issue which has a precedential effect and needs Supreme Court determination.

CONCLUSION

This case presents no issues which warrant the granting of certiorari.

Respectfully Submitted,

Richard N. Flint
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William L. Killion
Of Counsel

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